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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-987

DANA I. KESTENBAUM,

Petitioner,

v.

FALSTAFF BREWING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
ARGUMENT	3
Petitioner Raises No Issue Justifying the Issuance of the Writ	3
The Court of Appeals' Opinion is Properly Based on the Insufficiency of Petitioner's Proof	4
The Issue of Public Injury is Improperly Raised In These Proceedings	11
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

Cases

Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974)	6
Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F.2d 97 (5th Cir. 1967), cert. denied, 390 U.S. 904 (1968)	12
Deaktor v. Fox Grocery Co., 475 F.2d 1112 (3d Cir.), cert. denied, 414 U.S. 867 (1973)	5
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	6, 10
Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), cert. denied, 412 U.S. 934 (1973)	5
Hunt v. Crumboch, 325 U.S. 821 (1945)	12
Kestenbaum v. Falstaff Brewing Corporation, 514 F.2d 690 (5th Cir. 1975)	2
Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), cert. denied, 409 U.S. 1001 (1972)	12
Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)	10
Parmalee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir.), cert. denied, 368 U.S. 944 (1961)	11

PAGE

Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir.), cert. denied, 419 U.S. 868 (1974) 4

Rogers v. Douglas Tobacco Board of Trade, Inc., 266 F.2d 636 (5th Cir.), cert. denied, 361 U.S. 833 (1959) 12

Schaffer v. Universal Rundle Corp., 397 F.2d 893 (5th Cir. 1968) 12

Scranton Construction Co., Inc. v. Litton Industries Leasing Corp., 494 F.2d 778 (5th Cir. 1974), cert. denied, 419 U.S. 1105 (1975) 12

Swettlen v. Wagoner Gas and Oil, Inc., 373 F. Supp. 1022 (W.D. Pa. 1974), aff'd, 511 F.2d 1395 (3d Cir. 1975) 6

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir.), petition for cert. dismissed, 419 U.S. 987 (1974) 4

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 6

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 10

White Motor Co. v. United States, 372 U.S. 253 (1963) 10

Statutes

15 U.S.C. § 1 1,2

15 U.S.C. § 15 1

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STATEMENT OF THE CASE

This private treble damage antitrust action was brought by Dana I. Kestenbaum ("Kestenbaum") under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Falstaff Brewing Corporation ("Falstaff") alleging numerous violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Petition for Writ of Certiorari omits many pertinent aspects of the proceedings in the lower courts. Accordingly, Falstaff offers the following additional statement of the case.

Kestenbaum, a former distributor of Falstaff beer in four Texas counties, sold his distributorship operations in three separate transactions in late 1970 and early 1971. Approximately one and one-half years later he filed this action, which was ultimately tried and submitted to the jury on four separate theories allegedly constituting violations

of Section 1 of the Sherman Act, 15 U.S.C. § 1: (1) price fixing; (2) territory and customer restrictions on resale of goods; (3) general combination and conspiracy in restraint of trade; and (4) restrictions on the sale of a going business concern.

The trial court's charge to the jury included instructions on the four above theories and concluded by inquiring of the amount of damages the jury might find as a result of the alleged antitrust violations in toto, rather than specifying damages separately from each alleged violation. The jury verdict consisted only of a finding for the Plaintiff and the assessment of damages in the amount of $60,517. Judgment was entered in favor of Kestenbaum for $181,551, treble the amount of the jury's verdict. Falstaff excepted to the judgment of the trial court and perfected its appeal to the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").

The predominant thrust of Falstaff's appeal was that the trial court's instructions to the jury on the substantive antitrust violations were erroneously submitted because they were unsupported by proof adduced by Kestenbaum at the trial of the case. Accordingly, Falstaff raised points of error based on the trial court's charge to the jury and the insufficiency of proof of violation, injury and damages under the various theories of liability. The Court of Appeals found error in the trial proceedings, reversed the judgment of the trial court, and remanded the case for new trial.[1]

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[1] The opinion of the Court of Appeals is reported as *Kestenbaum v. Falstaff Brewing Corporation*, 514 F.2d 690 (5th Cir. 1975). The Court determined that a remand for new trial was necessary because the trial court's general charge made it impossible to determine on which one or more of the four liability theories the jury had found in favor of Kestenbaum. 514 F.2d at 693-94.

Kestenbaum now petitions this Court for a Writ of Certiorari and thereby assails virtually all aspects of the opinion of the Court of Appeals.

ARGUMENT

Petitioner Raises No Issue Justifying the Issuance of the Writ

Kestenbaum's Petition for Writ of Certiorari attacks the opinion of the Court of Appeals on a broad front. The four questions Kestenbaum seeks to bring before this Court rely on strained interpretations of the evidence presented at the trial of the case and avoid the unequivocal rulings of the Court of Appeals. Using the same tactic as he employed before the Court of Appeals, Kestenbaum attempts to uphold the judgment of the trial court by arguing theories of substantive law different from those embodied in the trial court's instructions to the jury. The Court of Appeals rejected this jury-argument approach and properly held that there was insufficient proof in the trial record to support the submission to the jury of price fixing and territorial restriction instructions. The Court of Appeals likewise held, largely as an evidentiary matter, that the trial court erred in submitting to the jury as a per se violation the alleged restraint on the price at which and persons to whom Kestenbaum could sell the goodwill or going concern value of his Falstaff distributorship. Finally, the Fifth Circuit's opinion reiterated the existing standard under which a private litigant can recover damages for alleged violation of Section 1 of the Sherman Act under a "rule of reason" approach.

In challenging the opinion of the Court of Appeals on each of the foregoing rulings, Kestenbaum's Petition does not advance any reason why this Court's writ should issue

in accordance with the criteria of Rule 19 of the Supreme Court. Although the Petition for Writ of Certiorari stands as an open invitation for Falstaff to demonstrate the insufficiency of Kestenbaum's proof by detailed reference to the evidence presented at trial and the trial court's instruction to the jury, these matters have been raised, argued, and passed upon by the Court of Appeals. No useful purpose is served by rearguing the evidentiary basis of this case, although the Petition for Writ of Certiorari obviously adopts this approach. It takes little more than a reading of the opinion of the Court of Appeals to demonstrate that the purely legal issues decided below are not of a nature and magnitude sufficient to warrant review by this Court under the criteria of Rule 19. Only brief discussion is required to confirm this proposition.

The Court of Appeals' Opinion is Properly Based on the Insufficiency of Petitioner's Proof

The Court of Appeals held that the trial court erred in submitting its price fixing charge to the jury because Kestenbaum's proof was insufficient. This ruling was founded upon the precedent of *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *petition for cert. dismissed*, 419 U.S. 987 (1974), where the Fifth Circuit articulated an antitrust plaintiff's burden of proof as follows:

> In order to recover treble damages under section four of the Clayton Act, [plaintiff] was required to prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done.

494 F.2d at 20. *Accord, Rea* v. *Ford Motor Company*, 497 F.2d 577, 589 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974);

Deaktor v. *Fox Grocery Co.*, 475 F.2d 1112, 1116 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 901-02 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973).

Kestenbaum charged Falstaff with price fixing of two varieties: (1) Falstaff's alleged direction of Kestenbaum's resale prices and (2) temporary price reductions participated in by Falstaff and Kestenbaum jointly, known as price promotions. The Court of Appeals properly held that Kestenbaum failed to satisfy the *Terrell* test under either of his two price-fixing theories.

Kestenbaum did not adduce at trial sufficient proof of causation or damages under the theory that his resale prices were directed by Falstaff.[2] The Petition for Writ of Certiorari does not purport to demonstrate any damages caused him by virtue of the level of the resale prices at which he contends he was compelled by Falstaff to resell Falstaff beer. He attempts to avoid this obvious defect by viewing "price fixing" as a "scheme" involving several steps, the effect of which was to increase Kestenbaum's resale prices with one-half of the additional markup going to Falstaff. Kestenbaum attempts to justify his position by arguing that absent this so-called "scheme" he would have been permitted to retain the entire increase (Petition for Writ of Certiorari at 12). This argument ignores the practicalities of the market place as well as the applicable antitrust law.

Kestenbaum would apparently assert his right to increase prices freely, but would ascribe illegality to Falstaff's price increase to him. This position is untenable. It is obvious that the antitrust laws do not prevent a supplier from raising prices to its purchasers. It is further clear that a

[2] 514 F.2d at 694-95.

manufacturer-supplier's adjustment of prices to its distributors in view of competitive resale pricing conditions does not violate Section 1 of the Sherman Act. *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 437 (1st Cir. 1974); *Swettlen* v. *Wagoner Gas and Oil, Inc.*, 373 F. Supp. 1022 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1395 (3d Cir. 1975). Kestenbaum's argument simply ignores the basic evil condemned in price fixing.

It is fundamental that price fixing, in either the horizontal or vertical context, consists of the "raising, depressing, fixing, pegging, or stabilizing the price of a commodity...." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). As demonstrated by *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), the anticompetitive evil condemned in price fixing of the type here alleged is that a supplier's continued control over a product fixes the price that the consumer must pay, which eliminates all competition among the buyers in the resale of the product. 220 U.S. at 399-400. Thus, as indicated by *Dr. Miles*, the evil is the "fixing" of resale prices. The thrust of Kestenbaum's argument is not that he was damaged or caused injury by the level of his resale prices, but that Falstaff increased its price to him.[3]

Kestenbaum's emphasis on Falstaff's price increases to him is further demonstrated by his purported damage figures, which reflect his increased cost by reason of Falstaff's price increases to him. The alleged damages do

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[3] The true nature of Kestenbaum's complaint is reflected by his following testimony at trial:

Q. Well, if I understand your complaint about price-fixing, it is that every time you would go up twenty cents in your price to the retailer, Falstaff would go up ten cents in its price to you; is that what it boils down to?

A. Yes, sir, if I went up twenty cents they went up ten cents.

Q. And that's what your complaint is?

A. Yes, sir. (R. 170)

not purport to reflect lost profits arising from the level of Kestenbaum's resale prices.

Similarly, Kestenbaum's argument with respect to price promotions simply ignores the plain holding of the Court of Appeals that Kestenbaum "failed to meet his burden of establishing a net economic loss" arising from his participation in price promotions.[4] The Petition for Writ of Certiorari further ignores the theory on which the action was brought and the trial court's price fixing instruction to the jury — Falstaff's alleged direction that Kestenbaum conduct price promotions. The same oversight compelled the Court of Appeals to hold that there was insufficient proof of *Terrell's* third requirement — the amount of damages — on this aspect of Kestenbaum's price-fixing theory of liability.

The simple fact that Kestenbaum is unable to refute is that his theories of price fixing and damages purportedly arising therefrom bear no relation to his resale prices, which in the final analysis are the only prices susceptible to being "fixed" under the trial court's charge and the applicable law. As the Court of Appeals properly decided, Kestenbaum's distorted price fixing theories caused the record to be deficient in evidence of causation and damages to support submission of the trial court's instruction to the jury on this theory of antitrust violation.

The Court of Appeals further held, in accordance with the basic rule announced in *Terrell*, that the trial court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside of Kestenbaum's geographic area of primary interest.

[4] 514 F.2d at 695.

The rationale of this holding was clearly articulated by the Court:

> It was improper to permit the jury to consider this aspect of territorial restriction since Kestenbaum failed to offer any proof of the extent of damage to his business proximately caused by such customer restraint.[5]

The Petition for Writ of Certiorari attempts to avoid this clear holding and circuitously argues that damages from customer and territorial restrictions can be measured by the additional expense required by the maintenance of three warehouses instead of one (Petition for Writ of Certiorari at 19-21).

It is apparent that Kestenbaum attempts to obscure the distinction between territorial restrictions as instructed to the jury and what he alleges to be a division of his distributorship operations into three separate areas with a warehouse contained in each. The crux of Kestenbaum's argument in this regard is that he was required to maintain a warehouse and distribution facilities in three separate locations. Kestenbaum argued that this requirement resulted in additional expense that could have been avoided by the consolidation of his operations within a single warehouse. This expense, as the Court of Appeals plainly noted, simply does not arise from the alleged restraint on sales to customers outside of Kestenbaum's geographic area of primary interest.[6] The Court of Appeals properly held that submission of the territorial and customer restriction

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[5] 514 F.2d at 697. The Court of Appeals further emphasized the insufficiency of Kestenbaum's damage proof as follows: "Kestenbaum never attempted to show the amount of monetary injury suffered because of loss of sales to retailers outside his territory . . . ." 514 F.2d at 697.

[6] 514 F.2d at 697.

instruction "despite the complete lack of damage proof" was error.

The Court of Appeals also held that the trial court erred in instructing the jury that if they found that Falstaff dictated the sale price of Kestenbaum's distributorship, Falstaff would be guilty of a per se violation of the antitrust laws.[7] Kestenbaum's Petition for Writ of Certiorari attacks this holding on the general proposition that "a rose is a rose, and price fixing is price fixing" (Petition for Writ of Certiorari at 18), in an apparent attempt to support his argument with prose rather than judicial authority. In so doing, Kestenbaum ignores both the authorities and the underlying basis of the Court of Appeals' holding — the evidence at trial did not warrant the submission of a per se instruction to the jury on the issue of the alleged restraint on the sale of Kestenbaum's distributorship operations.

The entire gist of Kestenbaum's theory of antitrust violation in this area is that Falstaff dictated the price at which and persons to whom he could sell his distributorship. In actuality, this theory relates to the sale of the goodwill or going-concern value of Kestenbaum's distributorship, being that value over and above the fair market value of assets and inventory on hand. As indicated by footnote to the opinion of the Court of Appeals, the record demonstrates there was no dictation of the price at which Kestenbaum could sell the goodwill of his distributorship.[8] Moreover, the Court of Appeals determined, on the basis

[7] 514 F.2d at 695-96.

[8] 514 F.2d at 698 n.7. Footnote 7 to the Court of Appeals' opinion reflects that Kestenbaum felt the goodwill of his distributorship was $49,000, Falstaff approximated the value at $25,000, and Kestenbaum ultimately sold for $30,000. A statement of the figures alone demonstrates that there was no "dictation" of the goodwill price of Kestenbaum's distributorship.

of the record before it, that the alleged conduct, even if proved, would not amount to a per se violation.

The crux of a per se violation under Section 1 of the Sherman Act is conduct presumptively injurious to competition. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 262 (1963); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). A review of the complete record convinced the Court of Appeals that the alleged conduct, even if proved, would be justified by legitimate business considerations and would not be so pernicious or presumptively injurious to competition that it should automatically be condemned without the necessity of analyzing its competitive effect or the reasons justifying it.

Although the Petition for Writ of Certiorari attempts to cloud the issue, the situation alleged is not one of retail price maintenance, where the evil condemned is that the supplier's continued control over a product fixes the price that the consumer must pay, which eliminates all competition among the buyers in the resale of the product. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 399-400 (1911). Clearly, no product is passing in commerce that will be fixed in price to the ultimate consumer; there is no elimination of competition in the resale of any product. What is involved is the transfer of a right to carry on an on-going relation as a distributor of Falstaff beer. The price of the transfer of this right has no conceivable effect on the public or anyone other than the immediate parties involved, and there is certainly no elimination of competition at any level of commerce.

Accordingly, the holding of the Court of Appeals that it was error to submit the alleged restriction on the sale of Kestenbaum's distributorship as a per se violation, was

proper, in accordance with judicial authority, and compelled by the evidence adduced at trial.

The Issue of Public Injury is Improperly Raised In These Proceedings

Kestenbaum's Petition for Writ of Certiorari raises as a fourth and final question the necessity of proving public injury in antitrust cases not falling within the per se proscription of Section 1 of the Sherman Act. It is obvious that this issue is not properly raised in these proceedings, as Kestenbaum himself requested the inclusion of the public injury element in the trial court's instruction to the jury on the general combination and conspiracy in restraint of trade theory. It was only in his brief for appellee to the Court of Appeals that Kestenbaum unilaterally advanced and strenously argued that the Court should sweep aside its long-standing judicial authority and eliminate all showing of competitive injury in order for a private antitrust plaintiff to recover damages arising from conduct not amounting to per se violation. The same argument is repeated by Kestenbaum's Petition for Writ of Certiorari.

In all fairness, the ruling of the Court of Appeals on this subject was apparently designed to provide guidance for the trial court upon the retrial of the case.[9] The ruling

[9] The Court of Appeals' discussion of public injury properly relates to Kestenbaum's general combination and conspiracy in restraint of trade theory. Under this theory Kestenbaum claimed that Falstaff's actions in requiring him to maintain warehouses in various counties, conduct bar spending, and participate in advertising in the local media, coupled with less damaging activities such as the method of shipment of beer and criticism of the operation of his distributorship, constituted an unreasonable restraint of trade under the "rule of reason" approach. Based on the well settled principle that the antitrust laws are not and "were never meant to be a panacea for all wrongs," *Parmalee Transportation Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.),

was merely a reiteration of the Fifth Circuit's prior holding in *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636, 644 (5th Cir.), *cert. denied*, 361 U.S. 833 (1959), as follows:

> [B]efore it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest. (emphasis in original)

This ruling is clearly in accord with the "rule of reason" standard followed by the Fifth and other Circuits. *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 517 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Schaffer* v. *Universal Rundle Corp.*, 397 F.2d 893, 897 (5th Cir. 1968); *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

The ruling of the Court of Appeals reiterating the standard of recovery under the "rule of reason" approach simply poses no issue meritorious of this Court's review. The standard is in accord with existing authorities and, indeed, is not properly presented upon this Petition for Writ of Certiorari.

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cert. denied, 368 U.S. 944 (1961); *see Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945); *Scranton Construction Co., Inc.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), Falstaff argued that the conduct of which Kestenbaum complained was simply not the stuff of which antitrust violations are made. Although its opinion is silent on the broader scope of Falstaff's objections to Kestenbaum's general combination and conspiracy theory, it is apparent that the Court of Appeals' treatment of the public injury issue is designed to underscore this principle. 514 F.2d at 699-700.

CONCLUSION

It is apparent that the rulings of the Court of Appeals for the Fifth Circuit attacked by Kestenbaum's Petition for Writ of Certiorari speak to evidentiary matters and are founded upon insufficiencies in the proof adduced by Kestenbaum at the trial of the case. Kestenbaum's Petition for Writ of Certiorari requests this Court to reconsider the evidence adduced at trial and to find contrary to the evidenciary rulings of the Court of Appeals. The task is obviously not one that should be undertaken by this Court. The holdings of the Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record developed at the trial of the case. Petitioner has not demonstrated, as he cannot, any meritorious reason why his Petition for Writ of Certiorari should be granted. Accordingly, Falstaff submits that Kestenbaum's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon counsel for Petitioner by placing the same in the United States mail, first class postage prepaid, and properly addressed to counsel of record for Petitioner, on this 9th day of February, 1976.

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